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THE SUPREME COURT OF NEW JERSEY
C-804 September Term 2009
065322

ON PETITION FOR CERTIFICATION
FILED: APR 22 2010

MOHAMED F. EL-HEWIE,
PETITIONER-PETITIONER,

V.

BOARD OF EDUCATION OF THE
BERGEN COUNTY VOCATIONAL
SCHOOL DISTRICT, ET AL.,
RESPONDENTS-RESPONDENTS.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-06310-07 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 20th day of April, 2010.

The foregoing is a true copy
of the original on file in my office

CLERK OF THE SUPREME COURT
OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
M-942/943
September Term 2009
065322

FILED: APR 22 2010

ORDER

MOHAMED F. EL-HEWIE,
PETITIONER-MOVANT,
V.
BOARD OF EDUCATION OF THE
BERGEN COUNTY VOCATIONAL
SCHOOL DISTRICT, ET AL.,
RESPONDENTS-RESPONDENTS.

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file a reply brief (M-942) is granted; and it is further

ORDERED that the motion to expand the record (M-943) is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 20th day of April, 2010.

The foregoing is a true copy
of the original on file in my office

CLERK OF THE SUPREME COURT
NEW JERSEY

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-6310-07T3

MOHAMED F. EL-HEWIE,
Petitioner-Appellant,
v.
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,
Respondent-Respondent.

Submitted October 5, 2009 – Decided December 24, 2009

Before Judges Lisa, Baxter and Alvarez.

On appeal from the State Department of Education, Docket No. 225-6/06.

Mohamed F. El-Hewie, appellant pro se.

Nowell Amoroso Klein Bierman, attorneys for respondent Board of Education of the Bergen County Vocational School District (Bradley M. Wilson, of counsel and on the brief; Lori E. Kolin, on the brief).

Anne Milgram, Attorney General, attorney for respondent Commissioner of Education (Jennifer L. Campbell, Deputy Attorney

General, on the statement in lieu of brief).

PER CURIAM

Petitioner Mohamed F. El-Hewie (El-Hewie or petitioner) appeals the termination of his employment with the Board of

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Education of the Bergen County Vocational School District (Board). On April 10, 2008, the New Jersey Commissioner of Education (Commissioner) adopted the twenty-eight-page February 27, 2008 decision of Margaret M. Monaco, ALJ, that El-Hewie was lawfully terminated for the 2006-2007 school year. The Commissioner further agreed with the ALJ that petitioner failed to prove his claim of discrimination. We affirm.

The following facts were developed at the Office of Administrative Law (OAL) hearing. Petitioner's employment as a teacher of mathematics for the 2005-2006 school year, beginning on November 28, 2005, required him to teach two calculus classes and three statistics classes at the Bergen County Academy (Academy), a highly competitive magnet school. El-Hewie "held the equivalent of a Master's Degree and a Doctorate in Engineering," but did not have any prior teaching experience. El-Hewie's ten-month nontenured teacher's contract stated that either party could terminate the agreement by giving the other sixty days notice. Additionally, on November 15, 2005, petitioner acknowledged receipt of an employee handbook stating that his "employment may be

terminated by the Bergen County Technical Schools District or the Bergen County Special Services School District, as applicable, at any time, with or without cause or notice subject to any collective bargaining agreement."

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Because El-Hewie was not a certified teacher, he was registered in the State's Alternate Route Program (ARP) on November 23, 2005. He attended training in the spring of 2006 and received a certificate of completion for the first of three phases. He was discharged from ARP on March 15, 2006, however, when the Human Resource manager for the District learned of his termination. As an ARP participant, El-Hewie was required to participate in a mentoring program.

According to the Academy's Dean of Students, problems with El-Hewie's classroom performance began within two weeks of his arrival. Students began to complain on a daily basis; on one occasion, three-quarters of a calculus class came to her office to do so. Their complaints included that El-Hewie was difficult to understand; that he appeared frustrated or angry when asked questions; that he would seat students according to their test scores, thereby embarrassing them; and that he assigned an excessive amount of homework. Several students and their parents also complained that El-Hewie discriminated against them, singling out individual students for embarrassing and unfavorable attention in class. Students also complained that not only were they not learning anything, but that they were

concerned about their performance in standardized tests administered at the end of the year.

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As a result of the complaints, petitioner's classroom was observed on several occasions by school administrators, including Dennis Montone, the District's Supervisor of Math and Science. When he observed El-Hewie, he noted that petitioner was "teaching above the kids' head[s]" and did not teach basic skills. As Montone walked around the classroom, a student tapped him on the hand and whispered, "please help us."

Principal Patricia Cosgrove began to receive complaints from students and their families during the second week of December 2005. As a result, she asked "the most seasoned recognized teacher on campus, . . . Joe Holbrook," to mentor and assist petitioner. Although Holbrook had never received formal mentor training, unlike those who were designated as ARP trainers, he had previously mentored approximately fifteen or sixteen math teachers. He met with petitioner nearly every morning, resulting in approximately fifty meetings. Cosgrove did not assign the official ARP math mentors to El-Hewie because she did not believe they could meet his significant needs.

School administrators came to agree that despite El-Hewie's advanced degrees, he was unable to effectively communicate any of his knowledge to the students and entirely lacked basic teaching skills due to either lack of prior teaching experience or

other reasons. On February 16, 2006, the principal directed

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that the process begin to remove petitioner due to "the complaints, the embarrassment, the way [petitioner] treated students, [and his] lack of classroom management." At the end of March, two of petitioner's five classes were assigned to a teacher who had returned after maternity leave. All of petitioner's classes would have been reassigned to her if she had agreed to take the additional classes.

The record also demonstrates that petitioner's second formal evaluation should have been "formative" rather than "summative." The difference between the two is that a summative evaluation is done in paragraph form, whereas a formative evaluation is completed by way of a checklist. Participants in the provisional teaching program typically must undergo a ten-week formative evaluation, a twenty-week formative evaluation and a thirty-four-week summative evaluation. Only the first two evaluations were completed as to petitioner.

At the end of the school year, petitioner refused to submit grades for students in his three remaining classes. This especially impacted his senior students, whose transcripts were delayed in being sent to colleges due to petitioner's refusal to turn in grades.

Commencing on April 13, 2006, El-Hewie began to make broad-brush attacks against school administrators and teaching staff

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similar to those made in his appeal brief. Specifically, petitioner wrote to the District superintendent and requested that an investigation be conducted into the "deceptive tactics of the administration of Bergen Academy in regards to mentoring new teachers, manipulating students' grades to serve personal ties at the expense of academic proficiency, and not disclosing information upfront on hiring new teachers."

During his OAL hearing, El-Hewie complained that he should have been mentored for the entire first month of his employment, rather than being placed in a classroom, so that he would have understood "the culture and politics of the district." He also maintained, despite the plain language in his employment contract, that provisional teachers could not be terminated unless there was a "very good reason to terminate," meaning that the teacher "did not fulfill his professional obligation." El-Hewie's testimony contradicted that of the Board's witnesses as far as meetings, mentoring efforts, and complaints. He denied that anyone had explained lesson plans to him or that he had ever been given lesson plans. El-Hewie insisted that when he asked questions of the mentor assigned to him, he was referred to the vice principal because the mentor would not respond. He also claimed that the mentor frequently lost his temper with him.

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At the OAL hearing, petitioner admitted that he was not surprised when his calculus classes were

reassigned. He also admitted forwarding letters in District envelopes to the parents of his students stating he would not submit final grades until "each student and family [knew] about the fraudulent management of an educational institution."

On April 28, 2006, petitioner sent a letter to the District claiming that his non-renewal was racially motivated. On October 24, 2006, he was advised that the claim was investigated and was not substantiated.

When El-Hewie appeared before the Board on May 17, 2006, he told them that he did not have any mentor and that he "never saw Holbrook teach anything." He explained that he was "really too exhausted, too loaded, too pressed to teach," and that he never had a chance to complete his lesson plans.

In his brief, El-Hewie asserts the following points of error:

> POINT ONE
> THE ALJ THREATENED PETITIONER BY MAKING HIM LOSE, THEN MANIPULATED THE FACTUAL FINDINGS AND APPLICATION OF LAW, BY LYING BY MAKING UP FACTS OF HER OWN, OMITTING ESSENTIAL FACTS, EXAGGERATING HEARSAY, AND APPLYING IRRELEVANT LAWS.
>
> POINT TWO
> THE ALJ ERRED BY OMITTING THE STATUTORY REQUIREMENT OF HAVING AND EXECUTING THE STATE-APPROVED DISTRICT MENTORING PLAN
>
> 8 A-6310-07T3
>
> BEFORE A SCHOOL DISTRICT COULD TERMINATE FOUR TEACHERS OF MATHEMATICS IN THE

SCHOOL YEAR 2005/2006 ALONE, WITH FABRICATED MENTORING ASSURANCES AND A BOGUS MENTORING PLAN.

POINT THREE
THE ALJ UNDERMINED PETITIONER'S BURDEN OF PROOF TO DISPARATE TREATMENT BY LYING, EXAGGERATING, OMITTING CRUCIAL FACTS, AND APPLYING IRRELEVANT LAWS, IN ORDER TO EXTRICATE HERSELF FROM AFFIRMING PETITIONER'S CLAIM TO DISPARATE TREATMENT IN PROVISIONAL TEACHER TRAINING AND EMPLOYMENT.

POINT FOUR
THE ALJ, DELIBERATELY AND MALICIOUSLY, OMITTED MULTIPLE CAUSES OF ACTION BY THE SCHOOL ADMINISTRATORS, TEACHERS, AND MANAGERS, WHICH CONSTITUTE FRAUD, CORRUPTION, DECEPTION, CONCEALMENT, NEGLIGENCE, CONSPIRACY, AND FAVORITISM.

POINT FIVE
THE COMMISSIONER'S FINAL DECISION ERRED BY OMITTING THE STATUTORY REQUIREMENTS OF EMPLOYING NOVICE TEACHERS PURSUANT TO N.J.A.C. 6A:9-8.3, 8.4, 8.6, AND 8.7 AND N.J.S.A. 18A:27-4.1A AND IN DISMISSING THE FALLIBILITY OF THE ALJ IN DISTORTING CRUCIAL FACTS AND APPLYING IRRELEVANT LAWS.

POINT SIX
THE FOUR DECISIONS OF THE COMMISSIONER OF EDUCATION, ON JANUARY 17, APRIL 10, MAY 27, AND JULY 8, 2008, CAUSED DELIBERATE AND UNDUE DELAY OF JUSTICE, CORRUPTED THE STATE LAW, AND INVADED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND CONSTITUTE BASIS FOR SUMMARY DECISION BY THE APPELLATE COURT, IN ORDER TO END THE UNDUE DELAY IN ADJUDICATION AND THE IRREPARABLE HARM [INFLICTED] UPON APPELLANT.

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We do not reverse an agency's decision unless it is "'arbitrary, capricious or unreasonable' or it is unsupported by 'substantial credible evidence in the record as a whole.'" In re Morrison, 216 N.J. Super. 143, 160 (App. Div. 1987) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). In determining whether an agency decision was arbitrary or capricious, judicial review is limited to four inquiries:

> (1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [Karins v. City of Atl. City, 152 N.J. 532, 540 (1998) (quoting George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994)).]

Even if the reviewing court would have come to a different result after evaluating the record, if "'the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm.'" Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001) (quoting Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988)).

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I.

As noted by the ALJ, it is well-settled that a board of education has broad "discretionary authority to decide whether any particular teacher should or should not be reengaged." Donaldson v. Bd. of Educ., 65 N.J. 236, 245-46 (1974). When one is engaged as a teacher, "he is fully aware that he is serving a probationary period and may or may not ultimately attain tenure." Id. at 245.

Accordingly, "absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." Dore v. Bd. of Educ., 185 N.J. Super. 447, 456 (App. Div. 1982). The board may "reach its conclusion about a nontenured teacher on a broad base of input received from a variety of people, including members of the public, parents of students and a board member's own knowledge of a teacher." Id. at 454.

The ALJ concluded that the Board's decision not to renew petitioner's contract was supported by substantial, credible evidence and was neither arbitrary nor capricious. She noted that prior to reaching a decision, the Board received input from "the Principal, Vice Principal, District Supervisor of

Curriculum, District supervisor of mathematics, guidance counselors, parents, and students." She also cited "deficiencies in petitioner's teaching," including his improper teaching methods, inability to

manage a classroom, and inability to foster positive relationships with his students. The ALJ opined that "[w]hile any one of these reasons would be sufficient to justify his non-renewal, a combination of all of these shortcomings plainly supports the Board's action."

Additionally, the ALJ noted that petitioner "fully apprised the Board at his informal appearance in May 2006" of his complaints concerning the lack of mentoring and of the purportedly improper timing of his evaluations. She rejected his claim that "the Board's decision was predicated upon misinformation by school employees concerning the obligations of the alternate route program, his mentoring status and his formative-phase status."

"When error in factfinding of a judge or administrative agency is alleged, the scope of appellate review is limited." Cannuscio v. Claridge Hotel & Casino, 319 N.J. Super. 342, 347 (App. Div. 1999). The reviewing court's role is to "survey the record to determine whether there is sufficient credible competent evidence in the record to support the agency head's

conclusions." Clowes v. Terminix Int'l, Inc., supra, 109 N.J. at 587.

The reviewing court should generally give "'due regard to the opportunity of the one who heard the witnesses to judge of their credibility . . . and . . . [give] due regard also to the agency's expertise where such expertise is a pertinent factor.'" Ibid. (quoting

Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). "Deference must be given to those findings . . . which are substantially influenced by [the] opportunity to hear and see witnesses and to have the feel of the case." Cannuscio, supra, 319 N.J. Super. at 347. When the reviewing court is satisfied that the findings are sufficiently supported by the record, "'its task is complete and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal.'" Ibid. (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

Without offering any support in the record, petitioner takes issue with most of the ALJ's factfinding. Deference must be given, however, to those findings that are substantially influenced by the ALJ's opportunity to hear and see witnesses. Ibid. This is especially appropriate when "the significant evidence is largely testimonial." Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 607 (1989).

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In the ALJ's twenty-eight-page opinion, she carefully and thoroughly summarized the testimony proffered by eleven of petitioner's twenty-one witnesses. She explicitly compared this testimony with that of petitioner himself. Over the course of the six-day hearing, she had the opportunity to observe all the witnesses and determine their credibility. Indeed, the witnesses she found credible offered ample evidence justifying petitioner's termination. Therefore, petitioner has not demonstrated that the ALJ's findings were "'so wholly insupportable as to result in a denial of justice.'" Rova Farms Resort, Inc.

v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974) (quoting Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div. 1960)).

II.

We will now address El-Hewie's arguments set forth in point two and a portion of point four. El-Hewie's second point appears to raise objections to the implementation of the mentoring program and training for provisional teachers. In reliance on Dore, supra, 185 N.J. Super. at 455, the ALJ concluded that the School Board's implementation of the mentoring program and summative, rather than formative, evaluation of El-Hewie were not fatal errors that prevented the Board from terminating him.

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In Dore, we said a school board's "lack of strict compliance" with statutory teacher evaluation requirements did not mean a non-renewed teacher had to be reinstated, or that the error allowed financial recovery. Ibid. The statute "does not provide for any penalty in the event a local board fails to follow the pr[e]scribed procedures." Id. at 456.

Applying the Dore principle to the present case, the ALJ found that although petitioner was not assigned an official ARP mentor, the Board made substantial efforts to provide him with even more extensive assistance and mentoring from various sources. Despite these efforts, petitioner's deficiencies persisted. Moreover, the relevant statutes do not purport to limit a board's right to

conduct evaluations of its nontenured teaching staff. See N.J.S.A. 18A:27-3.1 ("Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester."). Failure to precisely adhere to the evaluation format by supplying a formative instead of summative evaluation is not error either.

When petitioner was hired, he was given a ten-month nontenured teacher's contract stating that either party could

terminate the agreement by giving sixty days notice. The Board had no obligation to renew his employment and was sufficiently justified in deciding to do otherwise. Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 577-78 (2009). The Board made significant efforts to help petitioner adapt to a classroom environment. The failure to strictly comply with statutory procedures does not require petitioner's reinstatement.

III.

El-Hewie also contends it was error for the ALJ to find he failed to establish racial discrimination by the Board. He supports his claims with the termination of two recently immigrated Russian teachers, although he acknowledges one of them resigned. He also avers he received no assistance in the classroom, that the mentoring documents were falsified, and that other teachers did

not suffer similarly adverse action. He disagrees with the ALJ's conclusion that his poor performance caused his termination, as opposed to discrimination. He further asserts that the ALJ erred in relying on the District's investigation, as those who conducted the investigation were District employees and therefore were not impartial. He alleges the ALJ maliciously undermined his claims by shifting the burden of proof, and that he established that it was more likely than

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not that a discriminatory reason was the cause of the Board's
decision to terminate him.

On the contrary, in assessing petitioner's discrimination claim, the ALJ correctly applied the burden-shifting analysis enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973). Under this framework, petitioner bears the initial burden of establishing a prima facie case of discrimination by a preponderance of the evidence. Ibid. To do so, he must demonstrate that: (1) he "belongs to a protected class"; (2) he "was performing . . . at a level that met [his] employer's legitimate expectations"; (3) he "suffered an adverse employment action"; and (4) "others not within the protected class did not suffer similar adverse employment actions." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 167 (App. Div. 2005).

When a claimant establishes a prima facie case, the burden shifts to the employer to "produce

evidence of a legitimate nondiscriminatory reason for the employment action." Id. at 171. The employer meets its burden "'[b]y producing evidence (whether ultimately persuasive or not) of non-discriminatory reasons.'" Mogull v. CB Commercial Real Estate Group, Inc., 162 N.J. 449, 469 (2000) (quotations omitted).

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When the employer offers a legitimate, non-discriminatory reason for its adverse action, the burden again shifts to petitioner "to prove by a preponderance of the evidence that the legitimate nondiscriminatory reason articulated . . . was not the true reason for the employment decision but was merely a pretext for discrimination." Andersen v. Exxon Co., 89 N.J. 483, 493 (1982). "An employee successfully meets this burden 'by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Greenberg v. Camden County Vocational and Technical Sch., 310 N.J. Super. 189, 199-200 (App. Div. 1998) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 217 (1981)).

Here, the ALJ concluded that even if petitioner satisfied his initial burden, the Board "proffered credible, legitimate, non-discriminatory reasons" for non-renewal. She found that petitioner failed to sustain his burden of demonstrating that the reasons articulated by the Board were pretextual. She opined:

> The record is bereft of any evidence to support petitioner's discrimination claim, or any evidence that petitioner was treated different[ly] than other individuals in the alternate route program and, as a result, suffered an adverse employment action. On

> the contrary, the evidence in the record is overwhelming that [the Board's] actions were predicated on legitimate, non-discriminatory reasons. Clearly, an employee's poor performance in discharging the duties of his position is a legitimate, non-discriminatory reason to terminate the services of the employee.

Even if petitioner had met the initial burden of presenting a prima facie case of discrimination, he did not proffer any evidence that a discriminatory reason more likely motivated the Board's non-renewal decision or that the Board's explanation was unworthy of credence. Ibid. "'[A]n employee's poor performance in discharging his duties is a legitimate nondiscriminatory reason to fire or demote the employee.'" El-Sioufi, supra, 382 N.J. Super. at 174 (quoting Casseus v. Elizabeth Gen. Med. Ctr., 287 N.J. Super. 396, 405 (App. Div. 1996)).

The ALJ was presented substantial credible evidence from multiple witnesses demonstrating that petitioner's teaching performance fell far below the Board's expectations and that he was unresponsive to the assistance offered to him. When presented with this evidence, petitioner merely reiterated his arguments regarding his lack of mentoring. Accordingly, the ALJ properly found that he failed to sustain his burden under the burden-shifting framework applicable to discrimination claims.

IV.

Petitioner's remaining points are so lacking in merit as to warrant no further discussion in a written opinion. R. 2:11- 3(e)(1)(D) and (E).

Overall, the agency decision in this case was overwhelmingly grounded in substantial credible evidence in the record as a whole, and was not arbitrary, capricious or unreasonable. After reviewing the record, we believe that the decision is a fair and reasonable implementation of applicable law and legislative policies.

Affirmed.

OAL DKT. NO. EDU 7673-06
AGENCY DKT. NO. 225-6/06

COMMISSIONER OF EDUCATION
DECISION

MOHAMED EL-HEWIE,
PETITIONER,

V.

BOARD OF EDUCATION OF THE : DECISION
BERGEN COUNTY VOCATIONAL
SCHOOL DISTRICT, BERGEN COUNTY,
RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.[1]

Petitioner's exceptions begin by charging the Administrative Law Judge (ALJ), with, *inter alia*: 1) having a pre-set disposition to frustrate the petitioner; 2) prejudging – at the time of opening statements before hearing the evidence – petitioner's claim of fraud against the Board; 3) refusing to heed petitioner's pleas for her to adhere to her initial

[1] It is noted that petitioner filed replies to the Board's reply exceptions. As *N.J.A.C.* 1:1-18.4 makes no provision for such a submission, they were not considered herein.

schedule order; 4) permitting counsel for respondent to go beyond the scope of direct testimony for the sake of not inconveniencing witnesses; 5) allowing counsel for the Board an extension for a sixth day of trial; 6) abusing her discretion by protracting the litigation process and requesting three extensions to issue her Initial Decision; 7) selectively crediting testimony and documentary facts favoring the Board while concealing the pervasive flaws in their mentoring, evaluation and support provided to alternate route teachers pointed out by petitioner; and 8) being overwhelmed by the details of evidence presented. (Petitioner's Exceptions at 3-11)

Petitioner's exceptions next object to certain of the ALJ's findings of fact, contending that these were adduced through the ALJ's erroneous adoption of fabricated versions of relative facts presented by some of the witnesses while wholly ignoring other relevant facts crucial to petitioner's case. In support of this assertion, petitioner presents snippets of hearing testimony of various witnesses and his analysis of what these testimonial advances signify or establish. (*Id.* at 11-85)

Finally, petitioner excepts to certain of the ALJ's conclusions of law, arguing that she clearly erred, *inter alia*, in: 1) applying irrelevant legal standards to her factual findings; 2) utilizing an improvised and unsubstantiated interpretation of the purposes of observation and evaluation of an alternate route teacher; 3) interpreting the regulatory framework with respect to the timing of evaluation for certification purposes; 4) favoring the Board by relieving it from its mentoring obligation to petitioner; 5) misinterpreting *Dore v. Bedminster Bd.*

of Ed., 185 *N.J. Super.* 147 (App. Div. 1982) vis-à-vis its relationship to this matter; and 6) misapplying the Supreme Court's burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 *U.S.* 792 (1973) with respect to the analysis of discrimination claims. (*Id.* 85-90). Petitioner concludes by urging the Commissioner to reject the Initial Decision and order that he be reinstated to his employment.

In reply, the Board urges that petitioner's exceptions are improper, illogical and irrelevant and are not "exceptions" within the intendment of *N.J.A.C.* 1:1-18.4, which requires that specific findings of fact and legal conclusions to which exception is taken be set forth along with specific supporting reasons. Rather, it charges that petitioner's exceptions bear no relation to the Initial Decision, but instead represent an attempt to re-litigate his case before the Commissioner and, therefore, it urges that these should be disregarded. (Board's Reply Exceptions)

After comprehensive consideration of the entire record – including hearing transcripts [2] and all evidentiary proofs – and exercising the requisite deference to the ALJ's assessment of the credibility of the witnesses, [3] the Commissioner concurs with

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[2] Hearing was conducted on July 24, 2006, January 26, March 19, March 27, April 16, April 17, April 23, and June 6, 2007.

[3] The applicable standard of review in this regard is clear and unequivocal -- the Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or

the ALJ that petitioner has failed to sustain his burden of establishing that the Board's non-renewal of his employment for the 2006-2007 school year was arbitrary, capricious, unreasonable, or otherwise improper. The Commissioner further agrees that petitioner has failed to meet his burden of proof with respect to any claim of discrimination against him by the Board.

Accordingly, the recommended decision of the OAL is adopted for the reasons comprehensively presented therein and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED. [1]

COMMISSIONER OF EDUCATION

Date of Decision: April 10, 2008
Date of Mailing: April 11, 2008

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unreasonable or are not supported by sufficient, competent and credible evidence in the record." (*N.J.S.A.* 52:14B-10(c)) A reasoned review of the record, with this governing standard in mind, provides absolutely no basis for concluding that the ALJ's credibility assessments and resultant fact finding were without the requisite level of support. To the contrary, the Commissioner is satisfied that the ALJ's recitation of testimony is both accurate and thorough and that she carefully measured conflicts, inconsistencies and potential biases in deciding what testimony to credit.

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07673-06
AGENCY DKT. NO. 225-6/06

MHAMED EL-HEWIE,
Petitioner,
v.

BOARD OF EDUCATION OF THE
BERGEN COUNTY VOCATIONAL
SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

Mohamed EI-Hewie, pro se

Bradley M. Wilson, Esq., for respondent (Nowell, Amoroso, Klein, Bierman, attorneys)

Record Closed: August 28, 2007
Decided: February 27, 2008

BEFORE MARGARET M. MONACO, AU:

STATEMENT OF THE CASE

Petitioner, Mohamed EI-Hewie, contests the non-renewal of his employment by the respondent, the Board of Education of the Bergen County Vocational School District, for the 2006-2007 school year.

1- OAL DKT. NO. EDU 07673-06

PROCEDURAL HISTORY

On or about June 22, 2006, petitioner filed a Petition with the Commissioner of Education. Petitioner had served as a provisional teacher with the Board of Education of the Bergen County Vocational School District (the Board or the district) during the 2005-2006 school year. Petitioner alleged, among other claims, that the Board violated the laws and regulations governing provisional teachers and discriminated against him. On or about July 14, 2006, the Board filed an Answer to Petition. The Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case. Petitioner filed a motion for emergent relief, which was denied by Administrative Law Judge Edith Klinger. On September 18, 2006, the undersigned held a pre-hearing conference and subsequently held various telephone conferences with petitioner and counsel for the Board. On January 30, 2007, the undersigned entered an Order denying the parties' respective motions for partial summary decision except to dismiss any claim on behalf of petitioner regarding student grading. By separate Order dated January 30, 2007, the undersigned granted in part and denied in part petitioner's motion to compel discovery and denied petitioner's motion for sanctions. A hearing was held on March 19, March 27, April 16, April 17, April 23, and June 6, 2007. Following the conclusion of the testimony, the record remained open for the receipt of transcripts and post-hearing briefs. After receipt of the transcripts, the parties submitted briefs and

reply briefs in support of their respective positions upon which the record closed.

FACTUAL DISCUSSION

Based upon a review of the documentary and testimonial evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I FIND the following pertinent FACTS and accept as FACT the testimony set forth below:

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On September 16, 2005, the Bergen County Technical Schools posted a position opening for a "teacher of mathematics (10 months - certificated)" for the 2005-2006 school year. The posted position was for the purpose of replacing another teacher who was leaving employment with the district The qualifications for the position stated in the notice included: (1) possess a New Jersey Certificate (Standard) - Teacher of Mathematics and/or obtain a teacher's certificate via Alternate Route Program; (2) Master's Degree in Mathematics - preferred; (3) experience teaching students at secondary level highly preferred; and (4) strong interpersonal communications and organizational skills - required. (P-6.1).

Petitioner was hired for the position and commenced employment on November 28, 2005. Petitioner held the equivalent of a Master's Degree and a Doctorate in Engineering. (P-5.1). Petitioner had no prior teaching experience. In July 2005, the Department of Education, State Board of Examiners,

issued a certificate of eligibility to petitioner providing that petitioner was eligible to seek employment in positions requiring the provisional certificate in the area of a teacher of mathematics (P-7.2). In November 2005, the Board of Examiners issued a provisional certificate to petitioner providing that he was authorized to serve as a teacher of mathematics. (P-73.1). Petitioner was assigned to teach the two calculus classes and the three statistics classes formerly taught by the teacher who had left the district A substitute teacher had been teaching the classes for approximately a month before petitioner commenced employment

Petitioner received a "10-month, Non-Tenured Teachers Contract" regarding his employment with the Board from November 28, 2005 to June 30, 2006. (P-7.1). The contract states:

> It is hereby agreed by both the parties hereto that this contract may be terminated by either party giving to the other sixty (60) days notice in writing of intention to terminate the same.

Linda Theos, a manager of Human Resources for the district, testified at the hearing. Ms. Theos explained that the Board does not enter into a contract for more than one

year with any teacher, whether the teacher is tenured or non-tenured. Petitioner's contract was a standard, non-tenured teacher contract. The Board does not distinguish between the one-year contract

for all other teachers and something different or more for an alternate route teacher.

On November 15, 2005, petitioner signed an "Acknowledgement of Receipt of Employee Handbook," which states: "I understand that my employment may be terminated by the Bergen County Technical Schools District or the Bergen County Special Services School District, as applicable, at any time, with or without cause or notice subject to any collective bargaining agreement." (R-8).

The job description for petitioner's position included the following performance responsibilities:

> 1. Comply with all applicable rules, regulations and policies ... [of] the Board of Education.
>
> 2. Maintain such records and reports as required under the provisions of State Law.
>
> * * *
>
> 4. Instruct, guide, discipline, and supervise in accordance with district curriculum goals and objectives.
>
> * * *
>
> 6. Create an environment conducive to learning and trust and appropriate to the maturity and interests of pupils.
>
> 7. Acknowledge and respect individual differences of each student and to provide the student with appropriate educational experience.
>
> 8. Maintain all records and data applicable to pupil progress and skill development.
>
> * * *
>
> 10. Foster sound relationships with students, parents, fellow teachers, non-teaching personnel, and administration through established channels of communications. (R-2).

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Part of Linda Theos' job responsibilities entailed being the contact person for individuals in the Alternate Route Program. On November 23, 2005, Ms. Theos sent a registration application for petitioner's enrollment in the State's Provisional Teacher Program. (P-12.1). Ms. Theos received the Provisional Teacher Program package for petitioner from the State on February 21, 2006. (P-12.2). Petitioner attended and completed training at the Montclair Regional Training Center from February 28,2006 to June 10, 2006, and received a certification of completion of the Phase I training. (P--55.1).

Vice-Principal Russell Davis conducted two observations of petitioner in the classroom. He observed petitioner's calculus class on February 16, 2006 and petitioner's statistic class on March 23, 2006. (P-21.1; P-22.2). Vice-Principal Davis subsequently reviewed the performance assessment reports with petitioner.

District Supervisor of Curriculum Richard Panicucci conducted an observation of petitioner in the classroom on April 3, 2006. (P-23.1). District Supervisor of Curriculum Panicucci subsequently reviewed the performance assessment report with petitioner.

By letter dated April 10, 2006, the Director of Human Resources, Thomas Klemm, informed petitioner that the Board would be receiving recommendations regarding petitioner's employment status at its meeting on April 19, 2006. (P-57.1).

Subsequent to this letter, petitioner sent a letter to Superintendent Robert Aloia, dated April 13, 2006, requesting to discuss the renewal of his contact in the public segment of the Board's meeting on April 19, 2006. (P-20.2). Petitioner also asserted various claims in the letter including, among others, "deceptive tactics" by the administration. After the Board's meeting, by letter dated April 20. 2006, Superintendent Aloia informed petitioner, pursuant to N.J.S.A 18A:27-10, that he would not be offered an employment contract for the 2006-2007 school year. (P-57.2). Petitioner's non-renewal was based on the following reasons:

> Non-renewal based on his poor classroom management and the fact that in the instruction he does not address the multiple and meaningful learning styles of the students nor is the instruction reflective of the cooperative learning model

> which serves as the basis for the District's instructional mission.
>
> Mr. El-Hewie has also been unable to build and sustain positive student-teacher relationships. (P-59.1).

On or about April 27, 2006, Principal Patricia Cosgrove completed petitioner's ten-week formative evaluation under the State's Provisional Teacher Program. (P-54.1; P-74.6). Petitioner refused to sign the evaluation. (P-74.7).

By letter dated May 4, 2006, Superintendent Aloia responded to petitioner's letter, dated April 25, 2006, regarding his request for the reasons why he

was not offered an employment contract for the 2006-2007 school year. (P-57.3). Superintendent Aloia informed petitioner that "[y]our evaluations set forth administrative concerns regarding your classroom management, the fact that your instruction does not address the multiple and meaningful learning styles of the students, and your inability to build and sustain positive student-teacher relationships." By letter dated May 6, 2006, petitioner requested an appearance before the Board. (P-57.5). Superintendent Aloia advised petitioner, by letter dated May 8, 2006, that petitioner may appear before the Board in executive session at its meeting on May 17, 2006 for the purpose of permitting petitioner the opportunity to convince the members of the Board to offer him reemployment. (P-57.4). The letter further informed petitioner that he was entitled to have a person of his own choosing present to advise and represent him at the Board's meeting. Petitioner appeared before the Board on May 17, 2006. By letter dated May 19, 2006, the Board's Business Administrator/Board Secretary informed petitioner that the Board determined to affirm its action upholding the recommendation of the Superintendent of Schools not to offer him a contract of employment for the upcoming school year. (P-57.6).

After petitioner's non-renewal, petitioner refused to submit a grade book and submit final grades for the students he had taught during the school year. (P-77.8). Petitioner also refused to give his grades to the teacher who had taken over his calculus classes in April 2006. (P-24.2). Principal Patricia Cosgrove explained that, as a result, the school had to hold up the college transcripts for the

seniors in his classes. In June 2006, petitioner sent a letter to all ninety-six students he had taught during the year,

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using the district's envelopes, entitled "Why a teacher refuses to submit the final grades of calculus and statistics for 96 high school students?" The letter details various allegations by petitioner. (R-7).

Subsequent to petitioner's non-renewal, a "Notification of Terminated Participation" form was submitted to the Provisional Teacher Program. The form instructs that "[i]f a provisional teacher leaves your school/district prior to completion of all program requirements, this form must be completed immediately upon their termination." Although the form originally submitted stated that petitioner "never began in the position" (P-71.1), the form was later corrected to indicate that petitioner completed twenty-eight weeks of full time teaching and the reason for petitioner leaving was "non-renewed." (P-72.1). Linda Theos explained that the Provisional Teacher Program advised her to resubmit the document to give petitioner credit for the time that he was employed with the district from November 28, 2005 through June 30, 2006. Based upon Ms. Theos' experience, petitioner could complete the remaining required weeks of the Provisional Teacher Program after securing employment with another district. The Board has hired alternate route teachers who had not completed their alternate route training in other school districts before commencing employment with the Board and completed the program through employment with the Board.

Petitioner acknowledged that he did not try to find out whether he could change school districts during his provisional year and begin teaching at a new district.

At the hearing, various witnesses employed by the Board testified about petitioner's teaching performance. In judging the strength of the evidence, the undersigned found these witnesses to be forthright and credible witnesses. They presented detailed and candid testimony, which was generally consistent with the testimony of other witnesses and the documentary evidence. The undersigned is not persuaded that any of these witnesses harbored a motive or bias to fabricate their version of the relevant facts. Plainly, on balance, petitioner has a greater stake in the outcome of these proceedings. The undersigned adopts as FACT the testimony of the witnesses detailed below. A summary of petitioner's testimony is later addressed.

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Linda Eickmeyer served as the Dean of Students during the 2005-2006 school year. She has been employed by the district for twenty-three years. In her role as Dean of Students, students would come to Ms. Eickmeyer when they had problems. Students first started coming to Dean of Students Eickerman regarding petitioner within two weeks of his employment. On the first occasion, approximately three quarters of one of petitioner's classes came en masse to her office and shared their complaints. Principal Cosgrove was at this meeting. Different students came to Dean of Students Eickmeyer's office on an almost daily basis to complain about

petitioner. The students complained that it was difficult to understand petitioner; petitioner appeared to be frustrated or angry when they asked questions; the students felt embarrassed because petitioner started to seat them in the classroom based on how well they did on tests; and students who did not do well on tests were given an enormous amount of homework. Based upon her conversations with the students, it appeared to Dean of Students Eickmeyer that petitioner lacked basic teaching skills, including a "positive relationship with students" and "a structured learning environment," which would necessitate a "structured lesson plan and a plan for the day." Dean of Students Eickmeyer shared the students' concerns with petitioner. She also discussed with petitioner his differential handling of students. Petitioner acknowledged to Ms. Eickmeyer that he treated students differently. Due to the many complaints which continued to be received by Dean of Students Eickmeyer and Principal Cosgrove, they asked the district math supervisor, Dennis Montone, if petitioner could observe Susan Cimmino's math class because she was considered one of the school's "master teachers." Dean of Students Eickmeyer explained that, due to the nature of the complaints, it appeared that petitioner was having "some classroom management issues" and, in Ms. Eickmeyer's opinion, Ms. Cimmino is "one of the best teachers as far as classroom and positive learning environment structure." Susan Cimmino, who testified at the hearing, has been employed as a math teacher in the district for approximately thirty-three years. Ms. Cimmino confirmed that, at Dean of Student Eickmeyer's request, petitioner observed one of her math classes.

Barbara Lasher served as a guidance counselor during the 2005-2006 school year. Guidance Counselor Lasher has over twenty years of experience in education. In or around shortly after petitioner commenced employment, students started coming to

Guidance Counselor Lasher concerning petitioner. The students complained that petitioner was not able to control the class; they were not learning anything from petitioner; and the students exhibited an "overall real frustration" and an "overall complete disenchantment" that "they were wasting their time being in his class." The students who approached Guidance Counselor Lasher were not always the same students. At least approximately ten students had come to her office regarding petitioner. Student complaints to Guidance Counselor Lasher about petitioner continued throughout the school year. The documents include an e-mail from one student to Ms. Lasher dated February 16, 2006 relaying certain actions by petitioner (P-78.5), along with an e-mail from Guidance Counselor Lasher to Principal Cosgrove, dated February 3, 2006, reporting that she had several students stop in to see her that day "with great concerns" over petitioner and the students "feel that they are not learning anything and are extremely concerned about their AP test at the end of the year." (P-78.7). In Guidance Counselor Lasher's experience, the number of student complaints was inordinate. Guidance Counselor Lasher met with petitioner on more than one occasion regarding the

students' concerns. She described that there was "never any real improvement" after the meetings with petitioner and the complaints from students continued.

Rona Gabin served as a guidance counselor during the 2005-2006 school year.
Guidance Counselor Gabin has thirty-six years of experience in education, twenty-three years as a teacher and thirteen years in the guidance department. Guidance Counselor Gabin also received complaints from students about petitioner, which she estimated began around January/February 2006. Several students, different than those who had complained to Guidance Counselor Lasher, came to her office "complaining about the way things were being conducted in the classroom and the fact that they were frustrated because they didn't feel that they were learning at the rate that they wanted to learn." Guidance Counselor Gabin described that the students felt that there was not "a lot of teaching to the general classroom going on." Petitioner tended to work towards or stand near one student in classroom while the other students "felt that they were more off on their own learning ... rather than being taught in general." The students expressed anxiety to Guidance Counselor Gabin about approaching petitioner and she attempted to role play a situation with the students so that they would be more

comfortable in approaching him. Several of these students later returned to Guidance Counselor Gabin regarding petitioner. Guidance Counselor Gabin met with petitioner in the presence of one student to

address the student's concern that he was not learning or getting answers from petitioner. The student later returned to Guidance Counselor Gabin and reported that the suggestions were implemented for a few sessions but then it went back to the regular pattern. Guidance Counselor Gabin reported the complaints received by her and by other guidance counselors regarding petitioner's classes to Principal Cosgrove. In Guidance Counselor Gabin's experience, the large number of complaints received by her from students was atypical for the school and atypical of any other teacher. Guidance Counselor Gabin described that, although there might have been a little change after meeting with petitioner and the students, "it seemed to always revert back." The students who came to her were frustrated because they were juniors and seniors. The students "wanted to learn the material" and "were concerned about getting a good foundation because they were ... graduating and on to college."

Russell Davis served as the Vice-Principal for the Bergen County Academics during the 2005-2006 school year. Vice-Principal Davis has fifteen years of experience in education. Vice-Principal Davis conducted two observations of petitioner in the classroom on February 16, 2006 and March 23, 2006. From an evaluation standpoint, the district looks for mostly proficient areas and some above the proficient level. The evaluations of petitioner's classroom performance did not fall to the district's desired level of proficiency. Based upon Vice-Principal Davis' observations, "the students were having a hard time following the lesson or following what point ... [petitioner] was trying to make during the lesson." Aside from petitioner, Vice-Principal Davis was

referred less than five to ten discipline problems school-wide during the 2005-2006 school year. Petitioner referred approximately fifteen to twenty students to the Vice-Principal during that school year. (see e.g. P-75.1; P-75.2: and P-53.2). Vice-Principal Davis met with some of the students referred by petitioner. The students voiced complaints regarding petitioner. One student brought Vice-Principal Davis a list of names from which it could be ascertained where the students fell on a particular test. Other students complained that they were getting more homework than other students because they did not do as well on tests and felt it was unfair. In Vice-Principal Davis' view, some of the students petitioner referred reflected classroom management issues and not discipline concerns.

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Richard Panicucci served as the District Supervisor of Curriculum during the 2005-2006 school year. He has fourteen years of experience in education as a teacher, a supervisor at the building level and in his current position. District Supervisor of Curriculum Panicucci conducted an observation of petitioner in the classroom on April 3, 2006. Based upon his observation of petitioner's classroom performance, District Supervisor of Curriculum Panicucci concluded that petitioner's teaching did not reflect the cooperative learning model that has served as a basis for the district's instructional mission; petitioner's instructional planning did not include adequate detail on the scope and resources for each daily activity; petitioner's instructional planning made no effort to vary instruction to appeal

to multiple learners; and neither petitioner's instruction nor his planning reflected the multi-faceted methods of assessment that are needed to address different learning styles and are a critical part of the district's mission. (P-59.2). District Supervisor of Curriculum Panicucci explained that he did not observe varying instructional modes, which increases the likelihood that the teacher connects with different types of learners but, instead, observed one instructional mode for the majority of petitioner's class. He did not observe some of the key elements in planning or enough detail in the daily activities. He did not observe a clear picture of assessment in the unit plan and the unit plan was not "up to specs." Although District Supervisor of Curriculum Panicucci did not witness any classroom arrangement issues, he recalled receiving e-mails circulated by administrators regarding petitioner's classroom arrangement issues. Classroom management issues are reported in the normal course to District Supervisor of Curriculum Panicucci. Aside from petitioner, District Supervisor of Curriculum Panicucci could not recall any classroom management issues being referred to him for any other teacher in the prior two to three years.

Dennis Montone is the supervisor of math and science for the Bergen County Technical Schools. He previously served as the Dean of Academics and has eight years of teaching experience. Supervisor Montone observed one of petitioner's classes on January 13, 2006. (P-77.6). He did an informal observation at the request of the building administration, which had notified him of complaints from students and parents regarding petitioner. Supervisor Montone's goal was to determine what

problems existed and to help petitioner in any way to rectify the situation. Supervisor

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Montone observed a "real strong disconnect" between petitioner and the students. Petitioner did not support the mathematics he was teaching with basic skills. The students' frustration was very evident to Supervisor Montone. Based upon his observation, Supervisor Montone believed that petitioner was lacking basic teaching skills. He explained that there was not enough feedback from the students through questioning. Petitioner stood at the front of the room and did a lot of lecture without engaging the students. There was not enough informal assessment, meaning that petitioner was not clear on what the students were having trouble with, and, because of this, petitioner continued to teach even though the students were missing the basic points of the concept. The students never understood why they were doing the concept petitioner was working on, petitioner continued to move to higher and higher levels and, as he did, the students' frustration grew. Supervisor Montone spoke to petitioner after the class and provided a few suggestions to him. Supervisor Montone also recommended the use of an overhead calculator and assisted petitioner in obtaining one for use in his class. Supervisor Montone later had conversations with Vice-Principal Davis regarding his observations of petitioner's classroom performance. Vice- Principal Davis had observed the same types of issues that Supervisor Montone observed. At the time of these conversations, Supervisor Montone and Vice-Principal Davis were there to try to support and

assist petitioner with the problems he was experiencing. Supervisor Montone had informal conversations with Principal Cosgrove and others regarding the ongoing problems petitioner was having in the classroom. Supervisor Montone described that "there was never a point where the students began to feel comfortable with what was going on [in] the classroom." Principal Cosgrove asked for Supervisor Montone's input during the renewal process. Based upon petitioner's teaching performance in the classroom, Supervisor Montone recommended the non-renewal of petitioner's employment.

Thomas Klemm served as the Director of Human Resources during the 2005-2006 school year. Director Klemm described that discussions regarding non-renewals begin around February. Director Klemm issues a memorandum to all administrators during the last week of February requesting their recommendations for non-renewals by the end of March. After receiving the recommendations for non-renewal, Director Klemm reviews all the documents in the employee's personnel file, which includes

evaluations, and discusses the evaluations with the administrative staff. Director Klemm discussed the reasons for petitioner's non-renewal with Principal Cosgrove, Vice-Principal Davis and District Supervisor of Curriculum Panicucci. They provided fairly consistent reports regarding petitioner's performance. Director Klemm must satisfy himself that the reasons for non-renewal are sufficient to go to the Board. Director Klemm was satisfied that the

reasons for petitioner's non-renewal were sufficient. (P-59.1).

Elizabeth Casarico has been a math teacher at the Bergen County Academies for approximately ten years. Ms. Casarico took over petitioner's two calculus classes at the beginning of April 2006. At that time, Ms. Casarico made an initial assessment of the students and, compared to her experience, the students were significantly behind where they should have been. Ms. Casarico had previously taught calculus and maintained a notebook of lesson plans. When Ms. Casarico took over petitioner's classes in April, the students were working on matters similar to what she had previously taught students at the beginning of January. Based upon her discussion with the other calculus teacher, that class was further ahead of petitioner's classes.

Joseph Holbrook has been employed as a math teacher at Bergen County Technical Schools for thirteen years. Mr. Holbrook has received a national award for distinguished high school mathematics teaching. (P-97.1). Vice-Principal Davis described Mr. Holbrook as "a veteran teacher at our school" and "very successful." District Supervisor of Curriculum Panicucci described him as an "outstanding" and "very successful" teacher, who "seems to have an excellent repoire with the students," and a "good model to follow." Mr. Holbrook has mentored other provisional teachers. (see ~ P-16.2; P-16.3). Mr. Holbrook described that he was an unofficial mentor for petitioner. Mr. Holbrook met with petitioner every day from 7 a.m. to 8 a.m. on probably fifty occasions. He also saw petitioner during the day and tried to assist petitioner with

anything he needed. Mr. Holbrook came to petitioner's classroom during a scheduled period on one occasion. The students were doing independent work. Mary Rooney, who has been a math teacher for twenty-five years, confirmed that she observed petitioner sitting with Mr. Holbrook in the morning before 8:00 a.m. Petitioner also acknowledged that he met with Mr. Holbrook in the morning.

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Patricia Cosgrove served as the Principal of the Bergen County Technical Schools during the 2005-2006 school year. Principal Cosgrove has over thirty years of experience in education. Around the second week of December 2005, Principal Cosgrove started receiving complaints regarding petitioner. She described that the "students were very frustrated that they were not being taught" and reported that petitioner "was very angry at them" and "had embarrassed them." The complaints escalated as the year went on and were "prolific." Principal Cosgrove also received complaints from parents that petitioner would embarrass students in front of other students and was not teaching. The parents were very concerned because petitioner had seniors in his classes and the students needed the foundation and knowledge base for college. She noted that the students at the school are "very motivated" and several students were accepted the prior year at Ivy league schools.

Principal Cosgrove described that Mr. Holbrook was petitioner's informal mentor from the beginning of his employment. Two weeks after petitioner started his employment, it came to the

district's attention that petitioner "needed intensive assistance" and, as a result, "we outreached even more so to Joe Holbrook" to assist and mentor petitioner. Principal Cosgrove explained that the district turns to its seasoned teachers, as well as the district supervisor and vice-principal, to help mentor and assist teachers who are in the alternate route program. It is a regular practice at the school to turn to "seasoned, extraordinary master teachers to work with novice and non-tenured teachers." Mr. Holbrook is an "esteemed member of the math department" and the "most seasoned recognized teacher on campus." He has mentored approximately fifteen to sixteen math teachers. Mr. Holbrook met with petitioner every morning on approximately twenty to fifty occasions. Although the school had two other math mentors, Principal Cosgrove did not consider assigning petitioner to them because she did not believe that they would be able to address petitioner's needs, which involved assistance with classroom management and building positive relationships.

In an e-mail dated February 3, 2006,Guidance Counselor Lasher advised Principal Cosgrove that she had several students stop in and see her that day "with great concerns" over petitioner, the students "feel that they are not learning anything" and they "are extremely concerned about their AP test at the end of the year." (P-78.7).

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Guidance Counselor Lasher relayed to Principal Cosgrove the students' concerns that they were not being taught, the students were very

frustrated and petitioner had personally embarrassed them in front of other students. On February 6, 2006, Principal Cosgrove sent an e-mail to Mr. Holbrook regarding meeting over this issue and reported that she was "getting multiple complaints from students and parents." (P-78.7). Principal Cosgrove was aware of problems regarding petitioner's performance before receiving this e-mail. Both the district and petitioner were aware of the problems petitioner was having with the students. As a result of these difficulties, District Supervisor Montone, Vice-Principal Davis and District Supervisor of Curriculum Panicucci observed petitioner's classroom performance and petitioner was directed to observe a seasoned teacher in the classroom. Principal Cosgrove was forwarded the e-mail sent by the student to Guidance Counselor Lasher on February 16, 2006. (P-78.5). She also received an e-mail from a parent on March 8, 2006. (P-78.4). Dean of Students Eickmeyer had met with petitioner and the student. Ultimately, the student was removed from petitioner's class. Principal Cosgrove described that this was one of the many complaints the school received about petitioner's teaching and noted that students at the school "rarely complain about facility members." Petitioner had students who were not doing well sitting in the front of the class, with students doing well sitting in the back. Principal Cosgrove explained that "[t]raditionally, teachers do not do that because they do not want to embarrass students" and are "sensitive to their self esteem." The school believes "very strongly in promoting their self confidence and self esteem" and does not internally rank students. Both Vice-Principal Davis and District Supervisor Montone spoke to petitioner about the confidentiality

of the students and not publicizing their rankings in math by their seating charts.

Apart from parents and students, Principal Cosgrove received feedback on several occasions from Vice-Principal Davis. District Supervisor of Curriculum Panicucci and District Supervisor Montone regarding petitioner's ability to run a classroom. The same repetitive themes came up concerning petitioner's lack of teaching, petitioner embarrassing the students, the anger and frustration and classroom management issues. Issues regarding petitioner's classroom management began around the second week in December. In her six years as a principal, Principal Cosgrove had not seen any other instances of classroom management issues. Petitioner was told multiple times

about the complaints, the issues regarding his teaching and the improvement he needed to make by Vice-Principal Davis, District Supervisor Montone, Dean of Students Eickmeyer and Guidance Counselors Gabin and Lasher.

By mid-February 2006, and prior to receiving petitioner's Provisional Teacher Program packet from the State, Principal Cosgrove had determined that it was necessary to remove petitioner from his teaching responsibilities because of "the complaints, ... the way ... [petitioner] treated students [and his] ... lack of classroom management." Principal Cosgrove "was concerned that ... [her] students were not learning." It was Principal Cosgrove's intention to totally remove petitioner from his teaching

responsibilities. It was necessary to bring back a teacher who was on maternity leave, Elizabeth Casarico. Ms. Casarico could not work during the morning and could only take over petitioner's two afternoon calculus classes. Principal Cosgrove met with petitioner on March 30, 2006 regarding removing him from the two calculus classes. (see P-74.1). Principal Cosgrove received an e-mail from petitioner the next day thanking her for relieving him from teaching the two calculus classes. (R-6).

Principal Cosgrove described that she "had gone through extraordinary measures," and the district had "done every1hing possible" to assist, support and mentor petitioner, and to address the classroom management issues. She explained that, as a principal, when she starts to receive a series of complaints from students and parents, Principal Cosgrove feels it is incumbent upon her to try and assist the teacher because the school wants their teachers to succeed. Toward this end, Mr. Holbrook met with petitioner and addressed teaching strategies. (P-59.2). Petitioner was asked to observe a seasoned teacher's class. District Supervisor Montone and Vice-Principal Davis met with petitioner and observed him formally and informally. Petitioner was also observed by the Director of Curriculum. Principal Cosgrove explained that an observation of a teacher is a tool to inform a faculty member of his/her strengths and weaknesses toward addressing any issues. Principal Cosgrove described that the district probably gave petitioner "more support than any other teacher" since she was at the school.

Principal Cosgrove recommended petitioner's non-renewal based on his poor classroom management; his lack of ability to engage and challenge students; and his

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inability to transfer skill and knowledge to his students. (P-59.2). Principal Cosgrove explained that, although she did not question that petitioner had the content knowledge, petitioner lacked the ability to disseminate it, as well as work with and engage the students. Principal Cosgrove candidly acknowledged that she completed the Provisional Teacher Program formative evaluation in error at the end of April and it should not have been completed prior to Mayor ten weeks after petitioner's enrollment in the program in February 2006. (P-54.1).

Petitioner did not recall any specific document in which he asserted racial discrimination before his non-renewal. Principal Cosgrove credibly testified that petitioner never complained to her about being discriminated against in school. On April 28, 2006, petitioner sent a letter to district administration claiming racial discrimination and unethical treatment in the workplace. (P-80.1) By letter dated October 24, 2006, the Manager of Human Resources, David Hartwick, informed. petitioner of the results of the investigation regarding his claims. The letter states that "[n]othing has been presented to suggest that the administration hinders equal employment rights based on racial bias or any other factor," and "[n]one of the staff or administration members interviewed substantiated and or corroborated your claim of racial discrimination or unethical treatment

in the workplace nor was any evidence presented to support your claims." (P-80.1).

THE TESTIMONY

Apart from the testimony which forms the foundation of the aforesaid findings of fact, a summary of petitioner's testimony follows.

Petitioner described that there was a period of approximately four months during which he was not told, and could not determine, who was his supervisor and his mentor. Petitioner stated that he was doing things with his own instincts, without any assistance and without knowing whether or not he was doing the right thing. Petitioner also testified that, on his first day of employment, Mr. Holbrook showed petitioner the book and storage areas, directed him to where he could obtain certain items and informed petitioner that he would be petitioner's mentor. Petitioner acknowledged meeting with

Mr. Holbrook in the morning before school started. According to petitioner, when he started at the school, petitioner did not know the function of a mentor. Petitioner also stated that Mr. Holbrook could not mentor him and "could not be of any help to" petitioner. When he asked Mr. Holbrook questions, he would direct petitioner to go somewhere else, such as to Vice-Principal Davis. According to petitioner, it would be very difficult to have a conversation with Mr. Holbrook regarding how to run a class because Mr. Holbrook would lose his temper. Petitioner testified that he did not have

any class lesson plans to teach the subjects. Petitioner acknowledged that, when he was hired, petitioner was aware that a teacher must do lesson plans and petitioner had to do a lesson plan presentation as part of the interview process. Petitioner did not ask anyone whether lesson plans for the classes existed.

Petitioner described how he had to grade students within the first two weeks of his employment, a complaint by a parent in January regarding a grade he had given and that the prior teacher was very generous with grades. Petitioner testified that there was a "little panic" in the class when he started because the other class was on Chapter 5 and his students were only beginning Chapter 2. The "panic" continued during the second trimester (December 6 through March 16) because the students were a month behind. Petitioner stated that his idea was to condense the two trimesters into one so he had to work the students hard. Approximately three of the students in the calculus class complained that he was going too fast, while approximately five of the students complained that he was going too slow. Petitioner stated that the statistics classes were a major problem and detailed some alleged problems with the students. Petitioner testified that, by the end of the second trimester, most of the students caught up with the exception of three students. Petitioner stated that, at this point, he believed everything was okay, he got used to the teaching style, he started learning from his mistakes and he started refining his technique. In petitioner's view, he "succeeded very well" in doing his job. Petitioner taught his way and did not believe that anyone ever told him what to teach, how much to

teach or how fast to go. Petitioner stated that he asked teachers questions regarding the timing of the trimester test and what he should teach in the first and second trimesters but did not believe he ever received an answer. Petitioner introduced photographs of charts he hung in the classroom and notes from students on teacher appreciation day in May. (P-33.1; P-34.1; P-35.1; P-37.1; P-38.1;

P-48.1; P-96.1 to P-96.6). Petitioner described that the student who had been removed from his class was a good student; the student was one of the most gifted students in his class; he never had a problem with the student before January 31, 2006 (see P-74.2); and petitioner did not want to lose the student from his class. Petitioner acknowledged meeting with Dean of Students Eickmeyer and a student during the course of the year regarding the student's concerns. Petitioner also presented an e-mail to District Supervisor Montone requesting him to attend his trimester tests on March 6, 2006 (P-77.3), which petitioner stated Mr. Montone did not attend. Petitioner introduced an e-mail he sent on March 26, 2006 to Principal Cosgrove, District Supervisor Montone, Dean of Students Eickmeyer, Mr. Holbrook and others in which petitioner invited them to a presentation in his class on March 28, 2006. (P-9.1). Petitioner believed that only Vice-Principal Davis and two teachers came to the presentation. Petitioner described that he asked District Supervisor Montone to come to his most troubled class; Mr. Montone later told petitioner that he should call his office if petitioner had a problem with

the class; and, after that visit, Mr. Montone did not return to petitioner's class.

Petitioner was requested to go to Principal Cosgrove's office on March 30, 2006. Although petitioner had previously met the Principal in the hallway and she came into his class on one occasion, this was the first time he went to the Principal's office for any type of official discussion. According to petitioner, he never knew that the school had any problems with his classes. Petitioner was told at the meeting that they were taking his two calculus classes so petitioner could focus on the statistic classes. According to petitioner, he was "shocked." On cross-examination, petitioner admitted telling Principal Cosgrove at the meeting that he was not shocked at all that she was taking him out of the classes and admitted sending Principal Cosgrove an e-mail the next day thanking her for relieving him of the two classes. Petitioner further acknowledged stating during the meeting that it was inappropriate to have him go to Susan Cimmino's classroom, that he went to college for fifteen years, he observed all kinds of teaching styles, and he had specific issues with students who were disturbing the classes.

Petitioner testified that Vice-Principal Davis had observed his class on or about January 6, 2006. Vice-Principal Davis later advised petitioner that it did not "look good"

and he would make it a non-formal observation. Vice-Principal Davis also provided certain suggestions to petitioner regarding his teaching. Vice-Principal

Davis later observed petitioner on February 16 and March 23, 2006 and Supervisor of Curriculum Panicucci observed petitioner on April 3, 2006. Petitioner articulated his position that the district could only evaluate him in accordance with the Provisional Teacher Program. In petitioner's view, although the district can observe his class for purposes of mentoring assistance, these evaluations could not be used for purposes of terminating a provisional teacher. Petitioner further articulated his position that a teacher in the Provisional Teacher Program cannot be terminated unless the district has a "very good reason."

Petitioner was directed to the principal's office on April 10, 2006. Vice-Principal Davis was also present. Vice-Principal Davis had given petitioner a copy of his report from the March 23, 2006 observation that morning. Petitioner was told at the meeting that he would not be renewed. In his later letter to the Superintendent, petitioner stated his position regarding his status as a provisional teacher and the evaluations that should have been conducted. Petitioner appeared at the Board's meeting on May 17, 2006. According to petitioner, his purpose for appearing was to show the Board how good he was and why he should not be terminated. Petitioner testified that he explained to the Board that Mr. Holbrook did not mentor him; no one came to his class; he never saw Mr. Holbrook teach; he was sent to watch another class; he did not have a chance to do any lesson plans; and he was evaluated every month. He also explained to the Board that he was told by Mr. Holbrook to go to Vice-Principal Davis with student problems. He was then later told by Vice-Principal Davis that he did not have these

student problems before petitioner started working at the Academy, and Vice-Principal Davis observed his class the same or the next day.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

In this matter, petitioner was employed by the Board from November 28, 2005 to June 30, 2006. It is undisputed that petitioner did not attain a standard teaching

certificate or tenure during his employment with the Board. The pivotal issue concerns the propriety of the Board's determination not to renew petitioner's employment.

From a procedural standpoint, the Board compiled with all of the statutory requirements governing the non-renewal of a teacher. The Board provided petitioner with notice on April 1 0, 2006 that it intended to discuss his employment status. N.J.SA 10:4-12b(8). On April 20, 2006, the Board notified petitioner that he would not be offered a contract for the 2006-2007 school year. Thereafter, in response to petitioner's request, the Board provided petitioner with a written statement of reasons for his non-renewal on May 4, 2006. N.J.SA 18A:27-3.2. See Donaldson v. North Wildwood Bd. of Educ., 65 N.J. 236 (197 i). At petitioner's request, the Board afforded petitioner the opportunity for an informal appearance before the Board on May 17, 2006 for the purpose of convincing the members of the Board to offer him re-employment. N.J.S.A. 18A:27-4.1(b);

N.JAC. 6A:32-4.6. Subsequently, by letter dated May 19, 2006, petitioner was informed of the Board's determination to affirm its action upholding the recommendation of the Superintendent of Schools not to offer petitioner a contract of employment for the next school year. N.J.A.C. 6A:32-4.6(i).

It is well settled that a board of education possesses broad and virtually unlimited discretion in renewing the contract of a non-tenured teaching staff member and non-tenured teachers have no legitimate claim of entitlement to continue employment. See Donaldson, supra. When one is engaged as a teacher, "he is fully aware that he is serving a probationary period and mayor may not ultimately attain tenure." & at 245. "[A]bsent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." Dore v. Bedminster Bd. of Educ., 185 N.J. Super. 447, 456 (App. Div. 1982). See WvckoffTwp. Bd. of Educ. v. Wyckoff Educ. Assn., 168 N.J. Super. 497,501 (App. Div. 1979), certif. denied, 81 N.J. 349 (1979) (no obligation exists on the part of the board to renew the contracts of non-tenured teachers); Kufel v. Union County Vo-Tech Bd. of Educ., 96 N.JAR.2d (EDU) 446 (a "district board has virtually unlimited discretion in hiring or non-renewing non-tenured teachers"). In determining whether to renew a teacher's contract, a local board has the "right to base its decision not to re-employ on matters outside of a

teacher's evaluations .... " Dore, supra, 185 N.J. Super. at 153. The board possesses the "right to reach its conclusion about a nontenured teacher on a broad base of input received from a variety of people, including members of the public" and "parents of students." Ibid. A board of education's decision to non-renew the contract of a non-tenured teacher should not be disturbed unless it is arbitrary or capricious. See N.J.SA 18A:27-4.1.

Petitioner's contention that, as a participant of the Provisional Teacher Program, he has a higher status to continued employment than other non-tenured teachers, and can only be terminated for a "very good reason," is without merit. N.J.SA 18A:27-1a addresses the rights of a novice teacher employed under a certificate of eligibility or a provisional certificate, such as petitioner. The statute instructs:

> A novice teacher employed by a board of education under a valid certificate of eligibility ... , or a provisional certificate shall be deemed to be a teaching staff member for all purposes and shall be entitled to all benefits and other emoluments of employment provided by law and regulation to teaching staff members. A novice teacher shall also receive the terms and conditions of employment provided to teaching staff members in the employing district under the collective bargaining agreement including, but not limited to, salary, sick leave, and health insurance benefits.
>
> N.J.S.A. 18A:27-4a(b) (emphasis added)].

In other words, petitioner is afforded no more than the terms and conditions of employment provided to other non-tenured teachers in the district. See In the Matter of the Application of Cora

Austin for Certification, EDE 11772-03, Initial Decision, (May 18, 2004), adopted, State Board of Examiners (July 1, 2004) <http:illawlibrary.rutgers.eduloalisearch.html> (recognizing that the board of education was not obligated to offer a teacher in the alternate route training program another year of employment).

Pursuant to N.J.SA 18A:27-3, "[teaching staff members may be employed and their salaries fixed and determined, under contracts, by a board of education for the period from July 1 ... to the succeeding June 30 .. ,," On or before May 15 in each year,

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the board must provide each non-tenured teaching staff member either a written offer of a contract for employment for the next succeeding year or a written notice from the chief school administrator that such employment will not be offered. N.J.S.A. 18A:27-10. Petitioner's contract of employment also included a sixty-day termination provision. This termination provision is standard contract language for non-tenured teachers. Mozier v. Cherry Hill Bd. of Educ., 450 F. Supp. 742,747 (D.N.J. 1977). See N.J.SA 18A:27-5: 18A:27-6; 18A:27-7; 18A:27-9. The termination provision in the contract has been the subject of numerous decisions by the Commissioner of Education. "These decisions make clear that employment contracts containing such a termination provision may be terminated in accordance with their terms, without the need to demonstrate 'good,' or 'just cause.'" Mozier, supra, 450 F. Supp. at 747-48.

The record clearly establishes that petitioner was a non-tenured teacher and the Board's non-renewal determination satisfied the requirements of N.J.S.A. 18A:27-10 and the notice provision in petitioner's contract. In addition, the Board's decision not to renew petitioner's employment is supported by substantial, credible evidence and cannot be said to be arbitrary or capricious. As previously set forth at length, the Board had the input from the Principal, Vice-Principal, District Supervisor of Curriculum, District supervisor of math, guidance counselors, parents and students. The credible evidence demonstrates a litany of identified deficiencies in petitioner's teaching performance, including petitioner's inability to manage his classroom, his inability to foster a positive relationship with the students and other improper teaching methods employed by him. In short, petitioner failed to comply with a number of performance responsibilities of his position. While anyone of these reasons would be sufficient to justify his non-renewal, a combination of all of these shortcomings plainly supports the Board's action. The undersigned rejects petitioner's claim that the Board's decision was predicated upon misinformation by school employees concerning the obligations of the alternate route program, his mentoring status and his formative-phase status. Indeed, according to petitioner's testimony, he fully apprised the Board at his informal appearance in May 2006 of his contention that he had not been properly mentored, evaluated and the like. Petitioner also noted the number of times he was evaluated, along with the alleged lack of mentoring, in his letter to the Superintendent on April 13, 2006. In other words,

the Board was aware of petitioner's position vis-a-vis his status

as a provisional teacher when the Board affirmed its non-renewal determination in May, 2006.

Equally un persuasive is petitioner's stance that, as an alternate route teacher, the Board is limited in the number and timing of the evaluations that may be conducted. Pursuant to N.J.A.C. 6A:9-8.6(a), "[a]n appropriately certified building principal or administrative designee authorized to supervise instructional staff shall observe and evaluate the provisional teacher three times during the first year of mentoring for purposes of certification." (emphasis added). The first formative evaluation shall be completed at the end of ten weeks after the teacher assumes full responsibility of a class. The second formative evaluation shall be conducted at the end of twenty weeks. A final summative evaluation shall be completed at the end of thirty weeks. N.J.A.C. 6A:9-8.6 (a). In the final summative evaluation, the building principal must make a recommendation as to whether a standard certificate should be issued. N.J.A.C. 6A:9-8.7.

Simply put, the regulatory framework addresses the nature and timing of evaluations that must be completed in the context of whether a provisional teacher should be certified. The regulations do not purport to limit a board of education's right and duty to conduct evaluations of its non-tenured teaching staff members. See N.J.S.A. 18A:27-3.1 ("[e]very board of education in this State

shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester" and "said evaluations are to take place before April 30 each year."). The intendment of this procedure for the observation and evaluation of non-tenured teaching staff members is to "improve professional competence, identify deficiencies, extend assistance for the correction of such deficiencies, provide a basis for recommendations regarding re-employment, and improve the quality of instruction received by the students served by the public schools." N.J.A.C. 6A:32-4.5(e). See N.J.S.A. 18A:27-3.1. See also Austin, supra (wherein the Board of Examiners noted that, in addition to the teacher's evaluations as a provisional teacher, she was also evaluated as a non-tenured teacher).

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The undersigned does not embrace petitioner's claim that the Board failed to adhere to the regulations governing the mentoring and evaluation of provisional teachers, which warrants petitioner's reinstatement. In Dore, supra, a non-tenured teaching staff member whose contract was not renewed argued that, because the board did not conduct the required three evaluations during the school year, it was improper for the board not to re-employ him. The Appellate Division disagreed. The court held that "the lack of strict compliance" with the evaluation requirements was not "a sufficient reason to afford petitioner either reinstatement or financial reward" and the statute "does not provide for any penalty in the event a local board fails to

follow the proscribed procedures." Dore, supra, 185 N.J. Super. at 455-56. This rationale applies with equal force to the within matter. Although it appears that respondent did not originally designate a formal mentor for petitioner, a departure from the training program requirements, if any, does not warrant petitioner's reinstatement. Indeed, the credible evidence demonstrates substantial efforts on the part of the district to provide petitioner assistance and mentoring from many sources toward helping petitioner improve his teaching performance. The mentoring provided to petitioner was at least equal to that given to other alternate route teachers. And, notwithstanding the district's good faith efforts to assist petitioner, the deficiencies in his performance continued. I CONCLUDE that the Board's non-renewal decision was neither arbitrary, capricious or otherwise improper.

Finally, petitioner has failed to establish any claim of discrimination. The New Jersey Supreme Court has adopted the burden-shifting framework enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) for analysis of discrimination claims. See Anderson v. Exxon Co .. U.S.A., 89 N.J. 483, 492 (1982). This approach sets forth the necessary components of a prima facie case of unlawful discrimination and the basic allocations of proof. In this regard, the petitioner bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. In general, the petitioner must prove that he belongs to a protected class; he was performing his job at a level that met the employer's legitimate expectations; he suffered an adverse employment action; and others not within the

protected class did not suffer similar adverse employment acts. See EI-Sioufi v. St. Peter's University Hospital, 382 N.J. Super. 145, 167 (App. Div.

2005). If this burden is satisfied, the burden "then shifts to the employer to• rebut the presumption of undue discrimination by articulating some legitimate, non-discriminatory reason" for the employment action. 19.c at 493. The employer's burden is one of production and not of proof or persuasion. Jansen v. Food Circus Supermarkets. Inc., 110 N.J. 363, 382 (1988). An employer will meet its burden "if its 'evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.'" Moqull v. CB Commercial Real Estate Group, Inc. 162 N.J. 449, 468 (2000) (citation omitted). The employer "must set forth 'reasons for its actions which, if believed by the trier of facts, would support a finding that unlawful discrimination was not the cause of the employment action,'" and the employer will meet its "burden '[b]y producing evidence (whether ultimately persuasive or not) of non-discriminatory reasons.'" 19.c at 469 (citation omitted). Once the employer offers a legitimate, non-discriminatory reason for its adverse employment action, the burden again shifts to the employee "to prove by a preponderance of the evidence that the legitimate nondiscriminatory reason articulated by the [employer] was not the true reason for the employment decision but was merely a pretext for discrimination." Anderson, supra, 89 N.J. at 493. "[A]n employee successfully meets this burden 'by persuading the court that a discriminatory reason

more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Greenberq v. Camden County Vocational and Technical Schools, 310 N.J. Super. 189, 199-200 (App. Div. 1998). (citation omitted). The ultimate burden of persuasion that the employer intentionally discriminated against the employee remains at all times with the employee. Jansen, supra, 110 N.J. at 383; Anderson, supra, 89 N.J. at 493.

Succinctly stated, even if petitioner is deemed to have met the first prong of the test, the Board has proffered credible, legitimate, non-discriminatory reasons for its actions and its non-renewal determination. Petitioner has failed to sustain his burden of demonstrating that the Board's articulated reasons are pretexual and not the true reason for any adverse employment decision. The record is bereft of any evidence to support petitioner's discrimination claim, or any evidence that petitioner was treated different than other individuals in the alternate route program and, as a result, suffered an adverse employment action. On the contrary, the evidence in the record is overwhelming that respondent's actions were predicated on legitimate, non-

discriminatory reasons. Clearly, an employee's poor performance in discharging the duties of his position is a legitimate, non-discriminatory reason to terminate the services of the employee. See EI-Sioufi, supra, 382 N.J. Super. at 174.

In sum, I CONCLUDE that the Board's determination not to renew petitioner's employment contract was neither arbitrary, capricious or otherwise improper. I further CONCLUDE that petitioner has failed to shoulder his burden of proof with regard to any discrimination claim.

ORDER

I **ORDER** that petitioner's Petition be and hereby is **DISMISSED.**

I hereby FILE this initial decision with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION for consideration.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A 52:14B-10.

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Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview

Plaza, 4th Floor, PO Box 500, Trenton, New Jersey' 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Date Received at Agency:

DATE MAR 3 2008
Mailed to Parties
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses
For Petitioner:
Sergie Orlov
Joseph Holbrook
Victoria Pero
Linda Theos
Patricia Cosgrove
Russell Davis
Richard Panicucci
Elizabeth Casarico
Thomas Klemm
Maria Stone
Susan Cimmino
Mary Rooney
Dennis Montone
Robert Aloia
Linda Eickmeyer
Margaret Haynes
Barbara Lasher
Michael Abramson

Emil Joseph Walerko
Mohamed EI-Hewie

For Respondent:
Rona Gabin
Linda Theos

List of Exhibits in Evidence
For Petitioner:
P-1.1 Applicant Reference Checklist dated November 4, 2005
P-1.2 Applicant Reference Checklist dated November 4, 2005
P-1.3 Applicant Reference Checklist dated November 4, 2005
P-1.4 E-mail from Mary Lach to Linda Eickmeyer dated October 3, 2005
P-2.1 E-mail from Regina Fusco to petitioner dated November 9, 2005

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P-2.3 E-mails to and from Joseph Holbrook and Thomas Klemm dated November 9, 2005
P-3.3 E-mail from Thomas Klemm to Patricia Cosgrove dated November 15, 2005
P-5.1 Evaluation of Foreign Educational Credentials (2 pp.)
P-5.2 Alexandra University Transcript (4 pp.)
P-6.1 Memorandum from Jean Scerbo to Andrew Nemec with attachments dated November 22, 2005 (6 pp.)
P-7.1 10-Month Non-Tenured Teacher's Contract
P-7.2 Certificate of Eligibility
P-8.1 E-mails dated December 2005 - January 2006 (3 pp)

P-9.1 E-mail from Mohamed EI-Hewie dated March 26, 2006
P-10.1 E-mails to and from Mohamed EI-Hewie and Linda Theos dated January 27 and 28, 2006
P-11.1 Facsimile from Linda Theos to Pauline with attachment dated January 30, 2006 (2 pp.)
P-12.1 Provisional Teacher Program (PTP) Registration Application
P-12.2 E-mails from and to Patricia Cosgrove and Linda Theos dated February 2006 (2 pp)
P-13.2 Facsimile to Linda Theos with attachment dated February 16, 2006 (5 pp)
P-13.3 E-mail from Linda Theos to Patricia Cosgrove dated March 6, 2006
P-13.4 E-mails to and from Patricia Cosgrove and Linda Theos date.d April-May 2006 (2 pp)
P-13.5 E-mails to and from Patricia Cosgrove and Linda Theos dated March 2006 (2 pp)
P-14.1 E-mail from Mohamed EI-Hewie to Linda Theos dated May 9, 2006
P-15.1 Letter from Linda Theos to Mohamed EI-Hewie dated May 11, 2006 with attachment (7 pp)
P-15.2 E-mail from Thomas Klemm to Patricia Cosgrove and Richard Panicucci dated April 16, 2006
P-16.2 Provisional Teachers Table

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P-16.3 Provisional Teacher Program Participants
P-18.1 Certificates (2 pp)
P-20.2 Letter from Mohamed EI-Hewie to Robert J. Aloia dated April 13, 2006 (3 pp)
P-21.1 Teacher Classroom Performance Assessment, observation date February 16, 2006 (4 pp)
P-21.2 E-mails to and from Russell Davis and Dottie McFadden dated January 23, 2006

P-22.2 Teacher Classroom Performance Assessment, observation date March 23, 2006 (5 pp)
P-23.1 Teacher Classroom Performance Assessment, observation date April 3, 2006 (7 pp)
P-24.2 E-mail from Elizabeth Casarico to Patricia Cosgrove dated June 16, 2006
P-33.1 Photograph
P-34.1 Photograph
P-35.1 Photograph
P-37.1 Photograph
P-38.1 Photograph
P-48.1 Photograph
P-50.1 Grade Sheets (5 pp)
P-53.2 E-mail from Russell Davis to Patricia Cosgrove dated April 17, 2006
P-54.1 Provisional Teacher Program Formative Evaluation (5 pp)
P-55.1 Regional Training Center form and checks (3 pp)
P-56.1 Tables (5 pp)
P-57.1 Letter from Thomas M. Klemm to Mohamed El-Hewie dated April 10, 2006
P-57.2 Letter from Robert J. Aloia to Mohamed El-Hewie dated April 20, 2006
P-57.3 Letter from Robert J. Aloia to Mohamed El-Hewie dated May 4,2006
P-57.4 Letter form Robert J. Aloia to Mohamed El-Hewie dated May 8,2006
P-57.5 Letter from Mohamed El-Hewie to Andrew Nemec dated May 6, 2006

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P-57.6 Letter from Andrew Nemec to Mohamed El-Hewie dated May 19, 2006
P-58.1 Non-Renewal Teacher of Mathematics

P-59.1 Board of Education, Informal Hearing, April 19, 2006
P-59.2 E-mails dated April 18, 2006 (2 pp)
P-60.1 E-mail to and from Thomas Klemm and Mohamed EI-Hewie dated May 21, and 22, 2006 (1 pp)
P-61.1 Letter from Thomas Klemm to Mohamed EI-Hewie dated June 2, 2006
P-61.2 E-mails dated June 14, 2006 (2 pp)
P-61.3 E-mail from Richard Panicucci to Dennis Montone dated June 15, 2006
P-63.1 Letter from Raymond Volpe to Aaron Graham dated July 2, 2002 with attachment (7 pp)
P-64.1 Letter from Robert J. Aloia to Aaron Graham dated October 27, 2004 with attachment (3 pp)
P-65.1 Mentor-Protege Agreement (25 pp)
P-67.1 Statement of Assurance of Position to Teach (2 pp)
P-68.1 Statement of Assurance of Position to Teach (2 pp)
P-69.1 Statement of Assurance of Position to Teach (2 pp)
P-71.1 Notification of Terminated Participation
P-72.1 Notification of Terminated Participation; Statement of Acknowledgement Regarding Mentoring Service for Notice Teachers; and Statement of Assurance of Position to Teach (3 pp)
P-72.2 E-mails dated April 13 and April 17, 2006
P-73.1 Provisional Certificate
P-74.1 E-mails to and from Mohammed EI-Hewie and Cherri Rodriquez dated March 29, 2006
P-74.2 E-mails dated December 9, 2005 and January 31, 2006
P-74.3 E-mails to and from Mohamed EI-Hewie and Patricia Cosgrove dated April 10, 2006

P-74.5 E-mail from Patricia Cosgrove to Mohamed EI-Hewie dated April 18, 2006

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P-74.6 E-mails to and from Mohamed EI-Hewie and Ellen Ross dated April-May 2006
P-74.7 E-mails to and from Mohamed EI-Hewie and Patricia Cosgrove dated May-June 2006 (2 pp)
P-75.1 E-mails to and from Mohamed EI-Hewie and Russell Davis dated January 5, 2006 (2 pp)
P-75.2 E-mail from Mohamed EI-Hewie dated January 10, 2006
P-76.1 E-mails to and from Cherri Rodriquez and Mohamed EI-Hewie dated December 13, 2005 (2 pp)
P-76.2 E-mails to and from Cherri Rodriquez and Mohamed EI-Hewie dated May 15, 2006 (2 pp)
P-77.3 E-mails to and from Dennis Montone and Mohamed EI-Hewie dated February 28, 2006
P-77.6 E-mails to and from Patricia Cosgrove and Dennis Montone dated April 18, 2006
P-77.7 E-mails dated May 22 and 24, 2006
P-77.8 E-mail from Dennis Montone dated June 23, 2006
P-78.1 E-mails dated December 7, 2005 (2 pp)
P-78.3 E-mails to and from Barbara Lasher to Mohamed EI-Hewie dated February 6, 2006
P-78.4 E-mails dated March 8 and 9, 2006 (2 pp)
P-78.5 E-mails dated February 16, 2006 (2 pp)
P-78.6 E-mails to and from Barbara Lasher and Mohamed EI-Hewie dated February 11 and 14, 2006 (2 pp)
P-78.7 E-mails dated February 3 and 6, 2006
P-80.1 Letter from David Hartwick to Mohamed EI-Hewie dated October 24, 2006 (3 pp)
P-83.2 E-mails dated January 6, 2006

P-84.1 E-mails dated June 14, 2006 (2 pp)
P-85.2 E-mail from Mohamed EI-Hewie to Thomas Klemm dated May 27, 2006

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P-85.5 E-mails to and from Thomas Klemm and Patricia Cosgrove dated June, 2006 (2 pp)
P-96.1 Student notes
P-96.2 Student notes
P-96.3 Student notes
P-96.4 Student notes
P-96.5 Student note
P-96.6 Photograph
P-97.1 Press Release, The Mathematical Association of America (2 pp)
P-99.2 E-mail from Mohamed EI-Hewie to Linda Eickmeyer dated December 16, 2005
P-102.1 DVD
P-106.1 Letter from Robert Higgins to Mohamed EI-Hewie dated November 22, 2006 with attachment (9 pp)

For Respondent
R-2 Position Opening for School Year 2005-2006
R-6 E-mail from Mohamed EI-Hewie to Patricia Cosgrove dated March 31, 006
R-7 Letter from Mohamed EI-Hewie with attachment (14 pp)
R-8 Acknowledgement of Receipt of Employee Handbook